

10/01/2004 13:24 FAX

002

ORRIN G. HATCH, UTAH, CHAIRMAN

CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
JON KYL, ARIZONA
MIKE DEWINE, OHIO
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
LARRY CRAIG, IDAHO
SAXBY CHAMBLISS, GEORGIA
JOHN CORNYN, TEXAS

PATRICK J. LEAHY, VERMONT
EDWARD M. KENNEDY, MASSACHUSETTS
JOSEPH R. BIDEN, JR., DELAWARE
HERBERT KOHL, WISCONSIN
DIANNE FEINSTEIN, CALIFORNIA
RUSSELL D. FEINGOLD, WISCONSIN
CHARLES E. SCHUMER, NEW YORK
RICHARD J. DURBIN, ILLINOIS
JOHN EDWARDS, NORTH CAROLINA

BRUCE ARTIM, CHIEF COUNSEL AND STAFF DIRECTOR
BRUCE A. COHEN, DEMOCRATIC CHIEF COUNSEL AND STAFF DIRECTOR

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 1, 2004

Deborah A. Garza, Chair
Jonathan R. Yarowsky, Vice-Chair
Antitrust Modernization Commission
1120 G Street, NW
Suite 810
Washington DC 20005

Dear Ms. Garza and Mr. Yarowsky:

We applaud the recent convening of the Antitrust Modernization Commission for its first meeting. We are now writing to suggest items for inclusion on the Commission's agenda.

As Chairman and Ranking Member of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, we have worked hard to forge a bipartisan consensus on the sound enforcement of this Nation's antitrust laws. The bipartisan composition of this Commission helps ensure that this important tradition of consensus will continue. We look forward to following the deliberations of the Antitrust Modernization Commission and to receiving the Commission's final recommendations.

Below we set out issues that we think ought to be priorities for review by the Commission. We do so without trying to prejudge an outcome or suggesting that we necessarily would support legislation to enact changes in these areas. Rather, we think the expertise of the Commission would be well spent on deliberating these issues in its efforts to review the antitrust laws and antitrust enforcement.

ANTITRUST LAW REFORM ISSUES

Exemptions: Exemptions to the antitrust laws create inconsistency in the law and are often not founded on sound economic policy rationales. While some exceptions may be warranted in special circumstances, each exemption effectively repeals antitrust law in a piece-by-piece manner. We believe, therefore, the Commission ought to undertake a thoroughgoing and comprehensive review of the appropriateness of and need for antitrust exemptions. Examples include, but are not limited to the Shipping Act of 1984, the McCarran-Ferguson Insurance Regulation Act, the Webb Pomerene Act, the Export Trading Company Act of 1982, and the recently enacted antitrust exemption for medical residency match programs. We also believe that you should consider ways to assure that the antitrust enforcement agencies take a more active role in commenting on proposed antitrust exemptions, which have often been enacted with little input from these agencies.

10/01/2004 13:24 FAX

Monopolization: Single, dominant firm conduct is one of the least clear and most controversial areas of antitrust. Moreover, the recent Supreme Court decision in *Trinko* calls into question doctrines that were previously thought to be settled, including the essential facilities doctrine. Some commentators have suggested that the Court's holding in *Trinko* with respect to the burdens a plaintiff must meet to successfully assert a Sherman Act Section 2 claim raise the bar too high for plaintiffs to bring monopolization cases, particularly in refusal-to-deal cases. Some wonder whether many seminal monopolization cases, including the government's lawsuits against AT&T and Microsoft could still be brought under these standards. We recommend you review the current state of monopolization law in the wake of *Trinko*, and consider whether you would recommend any legislative changes. In addition, the business community would benefit from a clear articulation of the principles in this area.

Also, Section 2 of the Sherman Act creates the potential for criminal penalties, but since the 1960s the Department of Justice has not pursued a criminal monopolization case. The Commission ought to examine the reasons for the Department of Justice's enforcement approach in this area.

Monopsony: A significant question has been raised as to whether the antitrust enforcement agencies are paying sufficient attention to the problem of monopsony. In many industries from agriculture to health care, monopsony or oligopsony buyers may exert undue influence on the marketplace, depressing prices and suppressing innovation. Whether the antitrust enforcement agencies are sufficiently enforcing the antitrust laws to prevent monopsonies which cause substantial injury to competition should be an important topic of study.

Robinson-Patman Act: Many economists and legal scholars have strongly questioned whether the Robinson-Patman Act's price discrimination provisions punish otherwise pro-competitive and pro-consumer behavior and thus hurt our Nation's economic growth. The federal antitrust agencies rarely enforce it, and even though it creates the potential for criminal penalties, a criminal case has not been prosecuted by the Department of Justice since the 1960s. Currently, private litigants are the principal enforcers of this Act, which carries treble damages. The Commission should review whether this law makes sense in the modern era while at the same time closely considering the possible benefits and costs of the Act to small businesses.

Remedies: Two remedies issues are being debated widely in the antitrust community, one of which adds to current remedies options and one of which decreases current options. First, federal antitrust agencies under current law are not authorized to seek administrative or civil monetary penalties in civil cases—they may only seek injunctive relief. That has raised the issue of whether injunctive relief alone is sufficient to punish illegal conduct or whether potential remedies ought to be enhanced by authorizing federal agencies to seek monetary penalties, too. On the other side of the equation, successful private plaintiffs under current law recover treble damages and also may recover attorneys' fees—this has led some to question whether such a fee recovery is appropriate. The Commission should review these distinct, but related issues.

10/01/2004 13:24 FAX

International Antitrust Enforcement: With the increasing globalization of the economy, international antitrust enforcement—and the need to avoid conflicts with foreign antitrust authorities—has grown more and more important. Unfortunately, there are several prominent cases of divergence between US and foreign agencies, particularly the EU (an example being the different results reached by the two jurisdictions on the GE/Honeywell merger). Additionally, many businesses feel that foreign merger reporting and filing fees have grown increasingly burdensome and costly. These issues deserve serious consideration by the Commission. We are aware of the past work of the International Competition Policy Advisory Committee and the current work of International Competition Network in this area, and recommend that the Commission use this body of work as a starting point for its deliberations to the extent any issues have not been already been substantially resolved.

Vertical Arrangements: The proper treatment of vertical relationships under antitrust law warrants review. For example, over fifty years ago, the Supreme Court held that tying arrangements are per se illegal but recent judicial opinions have moved towards a rule-of-reason analysis. We believe the Commission should deliberate what the proper standard should be. Likewise, whether the per se ban on resale price maintenance is the appropriate standard is another topic that has attracted critical scrutiny. This issue warrants deliberation, too.

Indirect Purchaser Suits: *Illinois Brick* restricts the rights of indirect purchasers to bring lawsuits for damages. This doctrine has consistently been the subject of much controversy as many contend that it unduly restricts the rights of consumers to sue for antitrust injuries. Many states now allow such indirect purchaser suits under state antitrust law, creating significant inconsistencies with federal law. As it has now been nearly thirty years since the Supreme Court decision, we believe that this limitation on private antitrust suits, and its effect on antitrust enforcement, warrants study.

State Action Doctrine: Some commentators and antitrust enforcement officials believe that the state action doctrine may sometimes shield conduct that should be subject to antitrust scrutiny. Therefore, we suggest that you examine the effect of the state action doctrine and whether it is being properly applied.

FEDERAL ANTITRUST AGENCY ISSUES

Investigation Time Limits: Antitrust cases are notoriously long—especially civil non-merger and criminal investigations—and thus can impose significant costs on businesses. A strong argument can be made that federal antitrust agencies ought to self-impose strict, internal time limits on these investigations. For example, some suggest that, if after a year a preliminary investigation has not yielded enough evidence to support issuing civil investigative demands or opening a grand jury, it should be closed without an otherwise compelling justification. Also, we suggest you examine whether these delays in civil matters are caused by insufficient resources being available at the antitrust agencies for these matters.

10/01/2004 13:25 FAX

Merger Review: Parties to mergers and acquisitions sometimes complain about the merger review process, particularly regarding the volume of information sought during the Hart-Scott-Rodino pre-merger process, the relevance of that information, and the expense of producing this information. An important topic of review is whether the burden imposed by this process can be lessened without detracting from the investigation into the likely effects on competition of the proposed merger or acquisition. In addition, in 2000 Congress attempted to make the merger review process work more efficiently by adjusting the thresholds under which pre-merger filings were required, and by creating a mechanism for the appeals of document requests under the Hart-Scott-Rodino Act. A review of whether this legislative reform has been successful, and whether any additional adjustments to the merger review process may be desirable, would also be valuable.

STATE ISSUES

State Enforcement: Some commentators have raised concerns regarding state antitrust authorities enforcing federal antitrust laws against conduct whose effect is nationwide in scope. Critics see this as effectively delegating to state authorities the enforcement of national antitrust policy. An examination of the proper role of states in enforcing antitrust law would be an important topic for study.

We thank you for your attention to these matters.

Very respectfully yours,



MIKE DeWINE

Chairman, Subcommittee on
Antitrust, Competition Policy, and
Consumer Rights



HERB KOHL

Ranking Member, Subcommittee on
Antitrust, Competition Policy, and
Consumer Rights